

Working Group V

Working document 19

Working group V « Complementary Competencies »

Subject : **Note by Mrs. Lena HJELM-WALLÉN, Member of the Convention**
"The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC"

Member of the Working Group will find hereafter a paper by Mrs. Lena HJELM-WALLÉN, Member of the Convention, representative of the Government of Sweden.

The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC

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WORKING DOCUMENT

Summary and early conclusions

The survey undertaken by the Swedish Institute for European Policy Studies (Sieps) shows that Article 308 EC has been regularly used as a legal basis for adoption of legislation throughout the period 1970-2000. Contrary to what may have been expected, there has not been any decrease during the last few years: roughly speaking Article 308 has been used with the same intensity or frequency since 1987. The survey shows, however, that the use of Article 308 was at its highest during the ten year period which began in 1975 and ended, with its peak, in 1985. Quite clearly, this should be read in the light of the institutional debate that followed after the first enlargement in 1973 (with the accession of the United Kingdom, Ireland and Denmark) and led to the adoption of the Single European Act in 1986. The most concrete result of that was the introduction into the EC Treaty of a new legal basis, Article 95, for adoption of legislation aimed at the establishment of an internal market. In practice, this made it possible to adopt much of the legislation which had - increasingly - come to be adopted on the basis of Article 308 (for example legislation relating to social policy, environment and consumer protection¹) in accordance with a procedure designed to make decision-making more effective: in contrast to Article 308 which requires unanimity in the Council (and merely consultation of the European Parliament), Article 95 enables the Council to act by qualified majority (and elevates participation by the European Parliament to the level of co-decision).

During the period which followed after 1986, much of the use of Article 308 as a legal basis has been re-directed towards the adoption of legislation in other fields. Notable, in that respect, are fields which we have labelled “general external matters” and “institutional and financial matters”. Furthermore, an increasing proportion of the legislation adopted on the basis of Article 308 has come to be given the form of regulations (rather than directives). The significance of this development has not yet been analysed. But an early impression with respect to “general external

¹ See e.g. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39/40); Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life (OJ 1978 L 222/1); and Council Directive 79/581/EEC of 19 June 1979 on consumer protection in the indication of the prices of foodstuffs (OJ 1979 L 158/19).

matters” is that Article 308 has been used to take action in matters which one may have expected to be dealt with outside the framework of the EC Treaty, in the context of the Common Foreign and Security Policy. Then, with respect to “institutional matters”, the impression is that Article 308 has been used to introduce ‘constitutional’ changes, which normally require amendment of the EC Treaty, for example the establishment of new organs (most notably the so called ‘decentralised agencies’).

Against the background of our statistical survey, we have reached the conclusion that there are good reasons to undertake a more thorough study of Article 308. The work this requires will be commenced immediately and is expected to be finalised by the end of January 2003. In addition to statistics, legal and historical/evolutionary aspects will be examined as well. Quite likely, focus will be set on the relationship between Articles 308 and 95 but also between those two and other, more specific - and, indeed, more recent - legal bases (e.g. Article 175 on environment and Article 152 on public health).

Method

As indicated by its title, the statistical survey comprises ‘legislation’ adopted by the Council on the basis of Article 308 (previously Article 235) EC. According to the EC Treaty, regulations, directives and decisions are legally binding and, therefore, are often referred to as legislation.² With respect to all regulations and close to all directives there is a formal requirement that they shall be published in the Official Journal of the EC (OJ).³ That requirement does not apply to decisions which shall only “be notified to those to whom they are addressed”. In spite of that, decisions have increasingly come to be published in the OJ. But unfortunately, the number of published decisions is only a small part of the total number and it is still not clear - at least not to the public - what the internal guidelines with respect to publication are. Therefore, for methodological reasons, decisions

² See Article 249 EC.

³ The directives which do not fall under the requirement for publication in the OJ are only those which have not been adopted in accordance with the co-decision procedure and are not addressed to all Member States. See article 254 EC. It should be noted that the requirement for publication of directives was less strict before the introduction of the co-decision procedure in 1993.

have been excluded from the survey.⁴ An additional reason to exclude decisions is that they are used, most typically, to deal with matters of individual and routine like nature, and that they consequently lack the general bearing often thought to denote ‘legislation’.

The information on which the statistical survey is based has been retrieved from CELEX, the internet-based register for acts published in the OJ. Essentially, a search has been made on all documents with a legal basis in Article 308 (exclusively or in combination with any other provision).⁵ This has then been narrowed down to comprise only directives and regulations.

The result is presented in five charts. Chart 1 shows the total number of directives and regulations adopted on the basis of Article 308 during the period 1970 - 2000. Then, Chart 2 specifies the number with respect to each type. The remaining ones, Chart 3, 4 and 5, indicate the substantive fields which the directives and regulations relate to: first, in their entirety, then, divided into periods of ten years and, finally, divided into periods of particular ‘constitutional’ significance. These are “1970-1986” (before the Single European Act), “1987-1992” (after the Single European Act but before the Treaty on European Union) and “1993-2000” (after the Treaty on European Union).

Seven different labels have been used to indicate the substantive fields: agriculture and external trade matters, internal trade matters, labour and social matters, institutional and financial matters, general external matters, environment and health matters, and, finally, miscellaneous. The last one includes *inter alia* legislation relating to energy, transport and Economic and Monetary Union. It should be emphasised that the above labels are the fruits only of our own, preliminary assessment, and that they are based on a rough characterisation of what we consider to be the *main* subject matter involved in a piece of legislation. A complete list of the directives and regulations covered by the survey is attached.

⁴ Non-binding legal acts, such as recommendations and resolutions, are excluded from the survey as well as corrections (corrigendum).

⁵ The entire survey has been made using the French, seemingly most reliable, version of CELEX.

The statistical survey

During the period 1970 - 2000, a total of 406 legal acts (67 directives and 339 regulations) was adopted by the Council on the basis of Article 308.

Chart 1: Total number 1970-2000

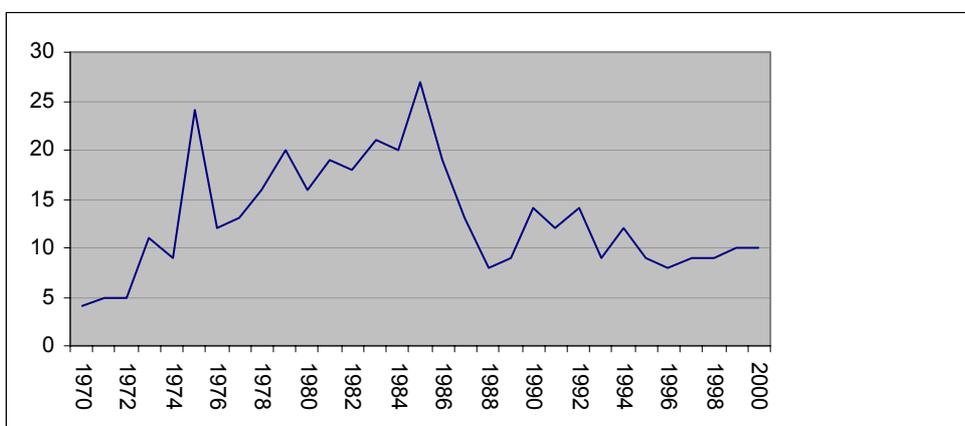


Chart 2: Directives and regulations 1970-2000

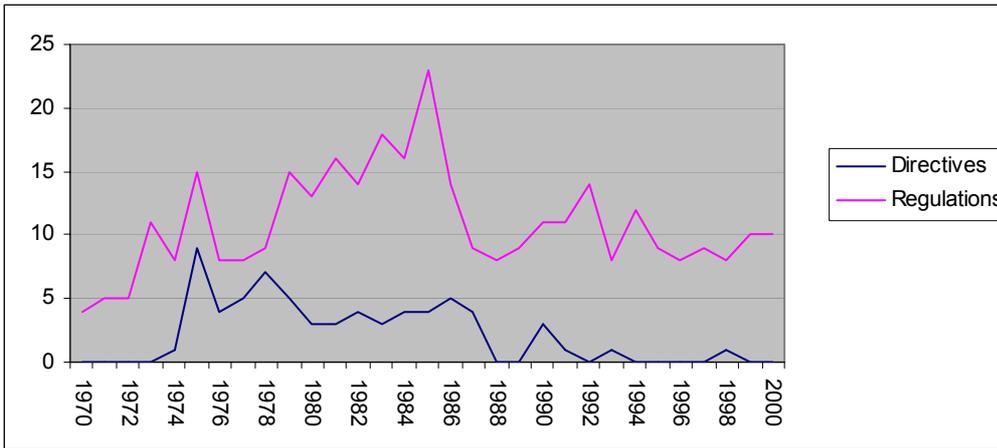


Chart 3: Substantive fields, the total number of legal acts adopted during the period 1970-2000

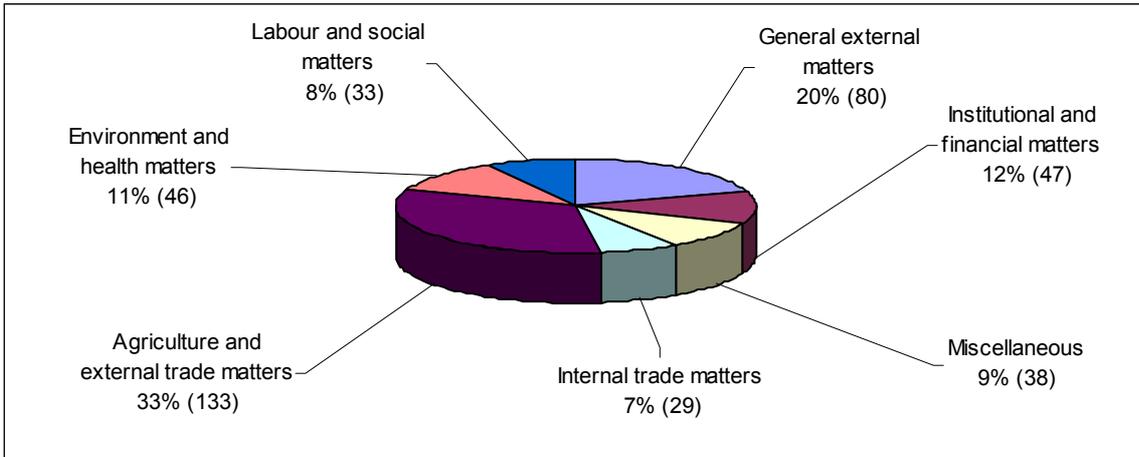


Chart 4: Substantive fields, the legal acts divided into periods of ten years

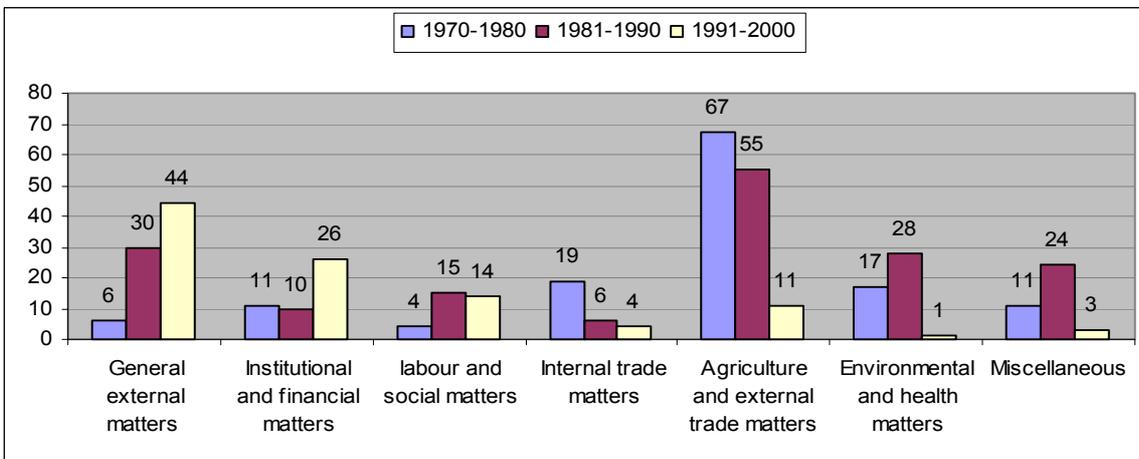


Chart 5: Substantive fields, the legal acts divided into periods of particular constitutional significance

